United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

76-4054

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4054

RCA GLOBAL COMMUNICATIONS, INC.,

Petitioner,

-against-

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

-and-

ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION,
WESTERN UNION INTERNATIONAL, INC.,

Intervenors.

On Petition for Review of an Order of the
Federal Communications Commission

BRIEF OF INTERVENOR
TRT TELECOMMUNICATIONS CORPORATION

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES

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JURISDICTION AND REFERENCES TO PARTIES AND RULINGS

Petitioner RCA Global Communications, Inc. ("RCA") filed its petition for review in this case pursuant to Section 402(a) of the Communications Act, 47 U.S.C. § 402(a)(1970) and 28 U.S.C. §§ 2341-53 (1970 & Supp. V. 1975). In so doing, it seeks to set aside, in part, a Report, Order and Notice of Proposed Rulemaking (JA 1-44) issued on January 7, 1976, by the Federal Communications Commission (hereafter "FCC" or "Commission"). (Docket No. 19660, 57 F.C.C. 2d 190 (1976)).

That order struck down the original "International Formula," which was established pursuant to Section 222(e) of the Communications Act, 47 U.S.C. § 222(e), and which since 1943 had governed the distribution of certain international telegraph traffic among RCA and the other International Record Carriers ("IRCs"),including TRT Telecommunications Corporation ("TRT") and the other two intervenors herein.[1/] To replace the 1943 formula, the January 7 order prescribed a new interim formula pending completion of rule-making proceedings looking toward adoption of a revised formula.

On March 5, 1976, by further Memorandum, Opinion and Order, the Commission stayed portions of its January 7 order, thereby leaving the 1943 formula in effect. The FCC took this action to enable it to consider various challenges to the January 7 order that had been made by RCA and Western Union International, Inc. ("WUI"). 58 F.C.C. 2d 266 (1976) (JA 110-12).

On September 27, 1976, the Commission released a further 15-page Memorandum Opinion and Order which rejected these challenges to its original order, but which continued its earlier stay pending timely application to this Court by

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1/ There are two other IRCs who did not intervene in this proceeding -- French Cable Telegraph Company and United States - Liberia Radio Corp. Together they account for less than 1% of the international telegraph traffic transmitted by the IRCs. (JA 13).

RCA and/or WUI for a judicial stay of the January 7 order. (JA 70-84).

On October 19, 1976, a panel of this Court (Oakes, C.J., and Timbers, C.J.) denied RCA's and WUI's motions to stay the January 7 order pending plenary review. On November 13, pursuant to an FCC order adopted on November 9, the interim International Formula was placed into effect.

QUESTION PRESENTED

Although RCA attacks the Commission's January 7 order on a variety of grounds, most of which center on its procedural aspects, this brief will be addressed solely to the substantive question raised by RCA's petition:

In exercising the discretion committed to it by Section 222(e) of the Communications Act to evaluate the operation of the 1943 formula and, if necessary, to replace it with a new formula, did the Commission err in taking the anticompetitive consequences of the old formula into account and in prescribing a new formula which would eliminate those consequences?

COUNTERSTATEMENT OF THE CASE

The January 7 order, which RCA seeks to set aside in this proceeding, struck down as inequitable and contrary to the public interest the "international formula" which had been utilized since 1943 to allocate so-called "unrouted" international message (i.e. telegraph) traffic among the IRCs in accordance with their 1942 market shares for international

message traffic. (JA 2-3)[2/] In its place, the Commission established an "interim" formula providing that "unrouted" traffic should be distributed among the IRCs in the same proportion as the "routed" traffic handled by each IRC. (JA 3).

As RCA has explained in its brief (RCA Br. 11-13), the necessity for some device to ensure fair distribution of such unrouted telegraph traffic arose in the early 1940's when the Western Union Telegraph Company ("Western Union") obtained a monopoly over domestic telegraph services. This monopoly power gave rise to the possibility that Western Union would unduly favor one IRC over the others in distributing such unrouted traffic. (Previously, when there was more than one domestic telegraph carrier, competition was relied upon to ensure that each IRC got its fair share of the unrouted traffic.) Thus, provision for a formula to distribute unrouted traffic was made in the same section of the Communications Act (47 U.S.C. § 222) which also authorized Western Union's domestic monopoly. (JA 3-6). See generally, <u>Western Union International, Inc</u>. v. <u>FCC</u>, 2d Cir. No. 75-4132, October 20, 1976, where this Court recently discussed at length the historical circumstances underlying Section 222, as well as its legislative history.

2/ As explained in RCA's brief (RCA Br. 19), more than half of the international message traffic transmitted by the IRCs is "routed" -- i.e. designated by the sender for transmission via a specific IRC. The international formula applies solely to "unrouted" messages which have not been designated by the sender for transmission via any particular IRC. (See also JA 11).

The 1943 formula essentially provided that the market shares of the IRCs be frozen at then current levels. This required detailed analysis of the market shares of each of the IRCs, using 1942 as a base period for accumulating data. The formula divided the world into three major areas -- Europe (Area A), Latin America (Area B), and the Pacific (Area C), which in turn were divided into 52 subareas, representing the 52 major countries or groups of countries served by the IRCs. (JA 14, 313).

The international formula also recognized four separate points of origin within the United States -- the cities of New York, Washington, D.C., and San Francisco, and the "Hinterland," representing all of the rest of the United States. The three above-listed cities were given this special recognition because they constituted "gateways" for RCA, ITT World Communications Inc. ("ITT") and Western Union Cables, the international section of Western Union, which pursuant to Section 222(c) was subsequently spun off into the now independent WUI.[3/] Although TRT, the fourth major IRC, had Miami and New Orleans gateways in 1942, the international formula gave no special recognition to those cities, but instead lumped them within the United States Hinterland.

3/ Under Section 222(a)(5), an IRC "gateway" is a city in which the IRC may serve the public directly; IRCs may serve the public located outside of their "gateways" only pursuant to interconnection with a domestic carrier, such as Western Union.

(JA 51-52, 296).

Finally, the international formula recognized 10 separate classifications of message service, i.e. full rate (first class), night letter (deferred delivery), press, Government, etc. (JA 444).

The international formula then analyzed the 1942 market share of each of the IRCs to the 52 foreign designations, from the four points of origin, in the 10 different classes of service, thereby utilizing more than 2,000 separate categories (52x4x10=2,080) by which to measure market shares. Thus, for example, TRT's 1942 market share for Bahamas messages from the Hinterland transmitted on a night letter basis represented its quota under the international formula for that particular category.

As RCA admits (Br. 13) the entire purpose of the formula in making this detailed analysis of the 1942 market shares was to

> "diminish . . .the incentive of the international carriers to expend effort and revenues in attempts to divert traffic from each other . . . ." (Separate Report of the Commission On Formulas for the Distribution of International Traffic, 10 FCC 184, 191 (1943).

While this explicit avowal of an anticompetitive intent may strike today's reader of the FCC's 1943 opinion as being inconsistent with settled antitrust/regulatory philosophy (see pp.18-24, *infra*), the Commission's purpose in prescribing the original formula takes on a different cast when it is realized

that Section 222 was prompted by circumstances which suggested that there would ultimately be "a merger of domestic carriers into one entity [as in fact took place pursuant to Section 222(c)] and international carriers into a second and entirely separate and distinct entity . . . ." Western Union International, Inc. v. FCC, supra, Slip Op. p. 7.[3a/] Thus, an anticompetitive formula could be justified, at least for a time, as a way-station to protect the IRCs from the new monopoly power of Western Union pending an eventual consolidation of all IRCs. But as the Commission observed in its September 27 order (JA 73-75), any such purpose which the 1943 formula may have originally served has long since disappeared, given the continuing vigor and competitive nature of the international communications industry.

The 1943 formula achieved its anticompetitive purpose by reducing the amount of unrouted traffic given to an IRC in any one of the 2,000 categories to compensate for any increase in routed message traffic (over its 1942 market share) which the IRC might subsequently have been able to obtain by virtue of its promotional efforts, superior service, etc. Thus, in short, were international telegraph traffic evenly divided between routed and unrouted messages and were the IRCs confined to exactly the same markets they served in 1942, the international formula would have taken one unrouted message away from an IRC to cancel out or neutralize every routed message which the IRC received.

Although at first reflective of actual market shares, over the years, as the shape of the dynamic international record

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3a/ See also Id. at pp. 10-11.

carrier industry changed, the international formula resulted in significant disparities between the amount of unrouted traffic assigned to a given IRC and its total share of routed international message traffic. TRT's experience in this regard is particularly illuminating.

In 1942, indeed for the next 30 years until 1972, TRT was a regional carrier limited by both its FCC authorizations and corporate policy to serving principally Central America plus a handful of other points in the Caribbean and South America.4/ (JA 214). In 1942 TRT served only 7 of the 52 subareas identified in the old international formula, and accordingly did not have market shares for the vast majority of subareas recognized by the formula. (JA 14).

Additionally, TRT's U.S. operations were conducted in the Miami and New Orleans gateways, cities which have a community of interest with Latin America, but are far less productive of international communications traffic than New York, Washington, and San Francisco, the gateways of the other IRCs. See Tropical Radio Telegraph Co., 35 F.C.C. 2d 950, 951 (1972). Accordingly, TRT had no meaningful volumes of traffic in the three cities recognized as separate points of origin by the formula. (JA 313).

In the last few years, however, TRT has obtained authority from the FCC to offer its services on a world-wide

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4/ During this period, TRT was known as "Tropical Radio Telegraph Company."

basis.[5/] Thus, during the thirteen-week study (Dec. 1,1974 - March 1, 1975) conducted by Western Union for the Commission's use in the proceedings underlying the January 7 order, TRT carried routed traffic to 42 out of 52 subareas. (JA 472-507).[6/] Moreover, earlier this year, TRT was authorized by the FCC to provide services from New York, Washington, D.C., and San Francisco, as well as its original gateways, so that it now can provide its world-wide services from all five gateway cities. International Record Carriers, 58 F.C.C. 2d 250 (1976)

However, in spite of TRT's recent impressive growth, the 1943 formula still regarded TRT as though it were the regional carrier portrayed in the formula's obsolete statistics. Thus, even though TRT now carries substantial traffic to every major country in Europe (subarea A) (JA 477-87) the formula awarded it absolutely no unrouted traffic to that part of the world. The same is true with respect to TRT's service to Area C.

The adverse impacts of the 1943 formula upon TRT

5/ See, e.g., Tropical Radio Telegraph Co., 35 F.C.C.2d 950 (1972) (direct service to Italy and other European points authorized).

6/ The subareas to which TRT did not send routed traffic were several countries in Eastern Europe, Luxembourg, China, Samoa, Midway and Wake Islands, Okinawa and Hawaii, an international service point under Section 222. See Western Union International, Inc. v. FCC, supra, Slip Op. p.8-9. Only Hawaii accounts for a significant volume of message traffic.

were by no means limited to depriving it of traffic to those areas of the world which it did not serve in 1942. For even in Latin America (Area B), the part of the world which TRT has always served, the formula operated to TRT's severe prejudice. Thus, during the 13-week study, TRT successfully competed for nearly 12% of the routed traffic to that area by expanding its market share of routed message traffic to countries which it served in 1942 and by opening circuits to countries in that area which it had not previously served directly. (JA 505). In attempting to reduce TRT's share of Area B traffic to 1942 dimensions, however, the formula restricted TRT to carrying only about 7% of the unrouted traffic to that area. (JA 505). This was accomplished by limiting TRT to the transmission of unrouted messages solely to the Bahamas, Belize (formerly British Honduras), and Colombia. (JA 313).

The impact of the 1942 formula upon TRT on a world-wide scale has been enormous. Thus, although TRT now transmits 5.55% of all routed message traffic between the United States and the rest of the world -- the only realistic measure of the competitive efforts of an IRC -- it receives only 1.4% of the unrouted traffic allocated by the formula. (JA 15). In other words, the 1943 formula allocates only one fourth as much unrouted traffic to TRT as its competitive efforts have won for it in achieving its share of routed message traffic.

Corresponding with the formula's continuing reductions of TRT allocations of unrouted traffic has been its assignment of a surplus of such traffic to RCA, the carrier which in 1942

held the greatest market share of the IRCs. Thus, in 1974 RCA's percentage of routed message traffic had fallen to 33.12%. Nevertheless the formula rewarded it with nearly 1/2 of all unrouted traffic (48.2%), in an attempt to restore RCA to the dominant position which it enjoyed in 1942. (JA 13). RCA's surplus has been at the expense of TRT, as noted above, and ITT, which received 33.68% of all routed traffic (more than RCA), but obtained only 11.4% of the unrouted traffic. (JA 13).[7/]

After analyzing these features of the international formula, the FCC in the January 7 order under review held the formula to be "inequitable as among the parties," as well as "against the public's interest in a strong, efficient public message service." (JA 3). The Commission's reasons for reaching these conclusions were then fully explained.[8/] After spelling out the means by which the formula, in effect, penalizes carriers who have been able to increase their market share, the FCC concluded that

> "individual carriers and the public have been harmed by the formula's denying a carrier unrouted traffic. The carriers so affected have seen their marketing efforts essentially nullified by the balancing provisions -- ironically, the more successful those efforts have been the more the carrier has been penalized. The formula's arbitrary disregard of the public's role has

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7/ WUI also received a significant surplus from the formula -- 37.9%, as compared to an actual routed market share of 26.5%. (JA 13).

8/ Moreover those reasons were further elaborated in the September 27 order. (JA 70-84).

> thwarted its expectations and may have resulted in an improper allocation of resources." (JA 26).

This was so, the FCC found, because the formula's nullification of IRCs' marketing efforts significantly "blunted" competition in international message service, contrary to the "vigorous competition" in which the IRCs engage in the offering of their other services. (JA 26). Thus, the Commission was acutely concerned that the disincentives erected by the formula as to the promotion of message service "discouraged improvements in [the] quality" of that service. (JA 17).[9/]

9/ As the Commission further explained in the September 27 order, this result was no longer in keeping with the mandate of Section 222:

> "The complicated structure of the formula, particularly the provision assuring carriers of all traffic specifically routed via their facilities, can only be explained as an attempt to allow the carriers to develop, while eliminating WU's discretion in choosing who was to receive traffic. In this respect, the original formula was definitely a pro-competition tool. The features of the formula we found objectionably anticompetitive (the fixed quotas and the balancing provisions) were necessary in 1943 as the most reasonable way to protect the IRCs against WU abuses. Our January Report and Order found that WU's divestment of its international operations had removed the need for those features and that traffic distribution could be made on a more dynamic basis . . . ."
> JA 73 (emphasis supplied) (Footnote and citation omitted).

See also pp. 6-7 ,supra.

Having found the international formula to be inconsistent with the statutory standard set forth in Section 222(e)(3), the FCC was obliged by that section to provide for an alternative manner for distributing unrouted traffic. Consistent with its recognition that the prior formula was inequitable as between the IRCs and injurious to the public interest, because of its systematic discouragement of service improvements or other efforts aimed at increasing an IRC's market share, the Commission concluded that "the public interest [would] be best served" if traffic could be distributed among the IRCs "on the basis of customer choice." (JA 27).

Also recognizing, however, that the record in the proceeding was not adequate to allow the FCC to require every customer to specify the IRC of his choice, the FCC adopted an "interim formula" to allow it to "proceed in [the] direction" of strengthening the public's role in choosing IRCs for the delivery of international message traffic.(JA 27). The FCC therefore determined that for an interim period, pending prescription of a final formula for distribution of unrouted traffic, it would require that all such traffic be allocated among the IRCs in accordance with the market shares which they obtained for routed traffic in the preceding six-month period for each individual foreign destination which they served. (JA 39-40). Thus, for example, if TRT could develop 10% of the US-UK routed message market during the six-month period, it would be allocated 10% of all unrouted US messages destined

to the UK for the following six months. In so fashioning its interim formula, the Commission concluded that it would

> "provide an equitable means of distribution which will focus on customer selection and give the IRCs a chance to solicit routings" (JA 28),

since the interim formula would reward every IRC for any new business which it was able to obtain by service improvements, promotional efforts, etc., rather than punishing it for departing from the prior status quo as the old formula had done.

Additionally, the Commission determined that the interim formula should "eliminate complexities which have made the present formula" difficult to administer and a source of controversy. (JA 28). Thus, the interim formula does not differentiate between places of origin within the United States, nor does it calculate updated market shares in accordance with the class of service provided by the IRCs. Instead, an IRC's allocation under the interim formula is solely a function of its proportion of international telegraph traffic between the United States and each foreign point which it serves.

As noted above, the interim formula became effective on November 13, 1976, following this Court's denial of RCA's motion for stay. By its petition for review RCA now seeks an order from this Court which would invalidate the Commission's interim formula and thereby force reinstatement of the 1943 formula.

ARGUMENT

The Commission Did Not Abuse Its Discretion when It Considered the Anticompetitive Effects of the 1943 Formula and Substituted an Interim Formula which Would Not Have Any Anticompetitive Effects.

The greatest part of RCA's brief is devoted to alleged errors of the Commission in failing to grant RCA the live, cross-examination hearing to which it claims it was entitled under Section 222(e) of the Communications Act and in failing to make the statutory findings allegedly necessary under that section with respect both to the invalidation of the 1943 formula and to the prescription of the interim formula which has now replaced it. In the light of the thoroughness with which the Commission and Intervenor ITT briefed those issues in their prior oppositions to RCA's motion for stay, TRT will not address these questions here.

Instead, this brief will be addressed solely to what, we respectfully submit, is the central question raised by RCA's petition, notwithstanding the subsidiary role to which it has been relegated in RCA's brief -- whether on the undisputed facts reflected in the record below and fully recited in the FCC's January 7 order, the Commission properly concluded that the 1943 formula should be invalidated and a new, less anticompetitive interim formula substituted for it. 9a/

9a/ WUI's brief essentially adopts the position taken by RCA. To the extent it developes an attack upon the substance of the FCC's order, WUI's contentions are also thoroughly disposed of in this brief.

> "Before considering this specific claim, it is appropriate that we note the narrow scope afforded a court of appeals in reviewing the Commission's actions under the Federal Communications Act, 47 U.S.C. §151 et seq. In such cases [the Court's] task is limited to determining 'whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear'; that is, 'whether this Commission has fairly exercised its discretion within the vaguish, penumbral bounds expressed by the standard of 'public interest.'"

Radio Relay Corporation v. FCC, 409 F.2d 322, 326 (2d Cir. 1969), (citations omitted).[10/]

Since, as we will now show, the Commission's January 7 order should be affirmed even under an expansive, *de novo* appellate review, it follows *a fortiori* that RCA cannot prevail in this Court under the "narrow scope afforded a court of appeals" in reviewing the January 7 order which is at issue in this case.

* * * *

Whatever the intent originally prompting the adoption of the 1943 formula or its initial impact, there can be no dispute that the old formula came to operate as a severe restraint upon competition among the IRCs. Indeed, as RCA concedes in its brief "[the formula] diminishes the incentive of the international

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10/ This Court's holding in the Radio Relay case is particularly pertinent here, in the light of the fact that the principal claim advanced by the petitioner there was that the FCC had erred in considering the competitive consequences pertaining to the exercise of its jurisdiction over communications common carriers.

carriers to expend effort and revenues in attempts to divert traffic from each other." (RCA Br. 13).

We have already described the impact that the formula has had on TRT. Even though TRT had grown from a regional to a worldwide carrier in the past thirty years, it had under the old formula been denied any share of unrouted traffic to most of the areas that it now serves solely because it did not serve them in 1942. By contrast, because RCA enjoyed a dominant position in the world market when the formula was established, it had been automatically assured of the lion's share of unrouted message traffic to most of the world, irrespective of any effort on its part to attract new customers or to improve its services. As the affidavits which RCA filed in this Court demonstrated, the formula's net effect has been to divert more than $2 million worth of international message traffic each year to RCA from TRT and ITT.[11/]

A market allocation scheme, which systematically retards new competition and entrenches the position of dominant forces in the market, is so patently anticompetitive that were it not for the explicit provisions of Section 222 and the FCC's approval of the 1943 formula the participation by the IRCs in

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11/ See, RCA Brief on Application for Stay at 68-69.

this scheme would have run afoul of the Sherman Act.[12/] See, e.g., United States v. Topco Associates, 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967); Timkin Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

The FCC properly reacted to the anticompetitive nature and gross inequities of this antiquated formula. RCA's claim to the contrary seriously misconceives the FCC's obligations under the Communications Act.

The FCC is broadly charged by Section 222(e) with ensuring that a "just" and "equitable" formula be used to distribute international message traffic. The Commission also has the responsibility under Section 1 of the Act, 47 U.S.C. § 151, to regulate

> "interstate and foreign commerce in communication by wire and radio so as to make available, as far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire . . . communication service with adequate facilities at reasonable charges. . ."

As the courts have recognized, Congress has thus conferred upon the FCC "expansive powers," National Broadcasting Co. v. FCC, 319 U.S. 190, 219 (1943), and has vested it with considerable discretion to meet the needs of a dynamic, rapidly changing

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12/ Viewed in this light, RCA's reliance upon the consentual nature of the original formula (RCA Br. 44) goes further to condemn its continuation than to support the position which RCA takes in this Court. Moreover, any contention implicit in RCA's brief that Section 222 was designed to reduce competition among the IRCs is rebutted by this Court's recent observation that "it was the intent of Congress to preserve the then existing competition in international communications . . . ." Western Union International, Inc. v. FCC, supra, at Slip Op. p. 14, n.1.

industry. Washington Utilities & Transportation Commission v. FCC, 513 F.2d 1142, 1157-58 (9th Cir.) cert. denied, 423 U.S. 836 (1975). See also, FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38 (1940); National Association of Theatre Owners v. FCC, 420 F.2d 144, 149 (D.C.Cir. 1969). For Congress reasoned, quite correctly, that regulatory practices and policies which are required to serve the public interest today may be quite different from those that were adequate years ago. Washington Utilities & Transportation Commission v. FCC, supra, at 1157.

The importance of competition in the Commission's regulation of the communications industry to ensure that it serves the present public interest was clearly established by the Supreme Court in FCC v. RCA Communications, 346 U.S. 86 (1953).13/

13/ The Supreme Court has similarly directed that other administrative agencies look favorably upon the benefits that competition can bring to the industries which they regulate. See, e.g., Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); FMC v. Aktiebolaget Svenska America Linien, 390 U.S. 238 (1968); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Cheseapeake & Ohio Railway v. United States, 283 U.S. 35 (1931). Most recently in Bowman Transportation, Inc. v. Arkansas-Best Freight System, 419 U.S. 281 (1974), the Court reaffirmed this line of decisions in a motor carrier context:

> "A policy in favor of competition embodied in the laws has application in a variety of economic affairs. Even where Congress has chosen government regulation as the primary device for protecting the public interest, a policy of facilitating competitive market structure and performance is entitled to consideration. 419 U.S. at 298

(continued)

There the Commission had authorized an international radio-telegraph carrier to open new circuits to areas which were already being served by existing carriers because of the "national policy in favor of competition." And, although the Court held that the Commission erred in basing its decision <u>solely</u> upon an assumed congressional preference for competition in this industry,[14/] the Court emphasized that "competition is a relevant factor in weighing the public interest", and laid out in considerable detail the basis upon which the Commission could consider competition in discharging its statutory responsibilities:

(footnote continued)

Moreover, the lower courts in recent years, in following the Supreme Court's teachings in the <u>RCA Communications</u> case, have approved the Commission's reliance upon the promotion of competition as a positive element of the public interest in authorizing new entrants into various aspects of the communications common carrier industry. <u>See</u>, Washington Utilities & Transportation Commission v. FCC, <u>supra</u>, 513 F.2d 1142; Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3rd Cir. 1974), <u>cert. denied</u>, 422 U.S. 1027 (1975). <u>See also</u>, Pocket Phone Broadcast Service, Inc. v. FCC, No. 74-2040 (D.C.Cir., July 16, 1976).

14 / The disposition of the case on remand is noteworty. The Commission held, on the basis of its experience, that competition resulting from the grant of the application was feasible and would serve the public interest. Mackey Radio and Telegraph Co., Inc., 19 FCC 1321, 1350 (1955), <u>aff'd</u>, RCA Communications Co., Inc. v. FCC, 238 F.2d 24, 27-28 (1956), <u>cert. denied</u>, 352 U.S. 1004 (1957).

"We think it not inadmissible for the Commission, when it makes manifest that in so doing it is conscientiously exercising the discretion given it by Congress, to reach a conclusion whereby authorizations would be granted wherever competiton is reasonably feasible. This is so precisely because the exercise of its functions gives it accumulating insight not vouchsafed to courts dealing episodically with the practical problems involved in such determination. Here, however, the conclusion was not based on the Commission's own judgment but rather on the unjustified assumption that it was Congress' judgment that such authorizations are desirable.

"In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, but the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service had improving it. Although we think RCAC's contention that an applicant must demonstrate tangible benefits is asking too much, it is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect. Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one, is not enough." 346 U.S. at 96-97 (Citations omitted).15/

15/ Similarly in Hawaiian Telephone Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974), the D.C.Circuit condemned the FCC's decision authorizing duplicative facilities in a particular market because the decision was based on a general preference for competition. Several months ago the D.C.Circuit characterized both RCA and Hawaiian Telephone as standing only for the proposition that

(continued)

In rendering its January 7 order, the FCC did not rely upon a bare, unexamined preference for competition in the abstract, such as was condemned by the Supreme Court in the <u>RCA Communications</u> case. Instead, it did precisely what the Court indicated should be done in examining the impact of competition upon regulated industries; in the words of the Court, it stated its "ground[s] for the reasonable expectation that competition may have some beneficial effect." The Commission explicitly held that it

> "believe[d] that for purposes of this proceeding an appropriate general statement of the public's interest is the statutory requirement that we guarantee residents of the United States a rapid, efficient communications service with adequate facilities and reasonable charges. 47 U.S.C. §151. We believe the market-sharing features of the present formula are ill-designed to advance this statutory goal. In the early days of international telegraphy, and particularly when cable carriers and radio carriers were separate entities, there was a vigorous competition which benefitted the public in the form of increased service coverage and substantially reduced rates. Today, in services such as telex and leased channel there is still a vigorous competition. The disappearance of radio/cable competition and the institution of the formula significantly blunted, although did not eliminate competition in message service. The charges for message service have not increased substantially, but there has been no stimulus under the present formula to improve service or increase efficiency." (JA 25-26).

(footnote continued)

"the Commission must not assume that competition is desirable for its own sake, but must consider all the factors" relevant to its decision. Pocket Phone Broadcast Service Inc. v. FCC, No. 74-2040 (D.C. Cir. July 16, 1976). <u>See also</u>, National Ass'n of Reg. Utilities Com'rs v. FCC, 525 F.2d 630, 636 n.25 (D.C. Cir. 1976).

RCA's contention (Br. 49) that "the Commission has not explained why" the replacement of the old, anticompetitive formula was necessary to serve the public interest ignores these explicit findings. Like the contention in the RCA Communications case that the FCC "must demonstrate tangible benefits" flowing from competition, RCA's argument here is, in the Supreme Court's words, "asking too much" of that or any other regulatory agency.

It is thus clear that the Commission's order here easily meets the standard set out by the Supreme Court for regulatory agencies which, like the FCC in the RCA Communications case, are considering applications by proposed entrants into regulated markets. That being the case, the Commission's order obviously satisfies what should be the even less demanding standard for judicial scrutiny of regulatory agency orders, which, like the one now under review, do not expand the number of entitites in a regulated market, but instead are designed solely to remove artificial and anticompetitive restraints operating upon the activities of the entities that are already competing in that market.

It is clear that there is an "antitrust component of the public interest, convenience and necessity standard," which requires particular scrutiny of agency actions that bear upon the existence of anticompetitive factors in the industries which they regulate. National Ass'n of Reg. Utility Com'rs v. FCC, 525 F.2d 630,636,639 (D.C.Cir.1976).15a/ Thus, whatever discretion the FCC may have to determine whether it should consider competition

15a/ Cf. Hush-A-Phone Corp. v. United States, 238 F.2d 266, 268 n.9 (D.C.Cir. 1956).

as a positive element in determining to grant an application for new entry into a regulated market, id. at 636, n.25, the courts have indicated that the FCC sometimes must consider potential anticompetitive practices or activities which fall within its regulatory jurisdiction:

> "[W]e note that not only is the Commission permitted to consider the anticompetitive potential of activities which fall within the purview of its jurisdiction, . . . in some instances it is obligated to consider them." General Telephone Co. of the Southwest v. United States, 449 F.2d 846, 858 (5th Cir. 1971) (Citations omitted). 16/

Certainly, the FCC's duty in this regard is particularly compelling when the anticompetitive consequences arise, as they do here, out of the Commission's own prior orders.

Against this background the Commission's duty in this case was clear. Following a two-year investigation, which took into account the results of an intensive survey of industry patterns, the Commission found that the 33-year old IRC formula impeded competition among the IRCs by penalizing those carriers who were most successful in attracting new routed traffic, while allowing those carriers who in 1942 held the dominant share of market

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16/ For this reason, courts have upheld Commission regulations designed to eliminate various anticompetitive practices of the broadcasting networks, as well as decisions refusing to grant licenses to applicants found to have engaged in anticompetitive practices. Metropolitan Television Co. v. FCC. 289 F.2d 874 (D.C. Cir. 1961); Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1950). See also, National Broadcasting Co. v. United States, 319 U.S. 190 (1943); United States v. RCA Corp., 358 U.S. 334 (1959).

to rest secure in the knowledge that the formula would operate to keep them in a position of supremacy.

Based on this data and the explicit findings set forth above concerning the manner in which the anticompetitive effects of the formula might well harm the public interest, the Commission held that the current formula was "unjust, unreasonable, inequitable and not in the public interest" and thus was in violation of Section 222(e)(3). These findings, grounded as they are in the record and in the Commission's unique perspective and expertise, represent a proper exercise by the Commission of its discretion under Section 222 which should not be disturbed by this Court.

CONCLUSION

For all the reasons set forth above, the Commission's Report, Order and Notice of Proposed Rulemaking of January 7, 1976 should be affirmed.

Respectfully submitted,

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November 19, 1976

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4054

RCA GLOBAL COMMUNICATIONS, INC.,

Petitioner,

-against-

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

-and-

ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION,
WESTERN UNION INTERNATIONAL, INC.,

Intervenors.

CERTIFICATE OF SERVICE

I, E. Edward Bruce, a member of the bar of this Court, hereby certify that copies of the Brief of Intervenor TRT Telecommunications Corporation were served, by United States mail, postage prepaid, this 19th day of November, 1976, upon the following:

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